No. 05-421

IN THE

Supreme Court of the United States

VINCENT S. ANDREWS, ROBERT L. ANDREWS and VINCENT ANDREWS MANAGEMENT CORP.,
Petitioners,

v.

LAFFIT PINCAY, JR. and CHRISTOPHER J. MCCARRON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict nor moved for a new trial under Rule 59. (This is the question presented in *Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, No. 04-597, *cert. granted*, February 28, 2005.)

2. Whether the decision in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), bars a federal appellate court from granting judgment as a matter of law to a party whose post-verdict filing, while making clear that the party is entitled to judgment, does not expressly ask for such relief.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Vincent Andrews Management Corporation has no parent corporation, and no publicly-held company owns 10 percent or more of its stock.

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Petitioners Vincent S. Andrews, Robert L. Andrews, and Vincent Andrews Management Corporation respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Pet. App. 1a-7a, and the order denying rehearing, Pet. App. 16a-17a, are unreported. An earlier opinion of the court of appeals, Pet. App. 18a-25a, is reported at 238 F.3d 1106. The order of the district court granting judgment for respondents, Pet. App. 8a-15a, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 16, 2005. A timely petition for rehearing and rehearing *en banc* was denied on June 30, 2005. *See* Pet. App. 16a-17a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 50 of the Federal Rules of Civil Procedure and Rule 7(b) of the Federal Rules of Civil Procedure are set forth at Pet. App. 43a-46a.

STATEMENT

The Rule 50(b) issues presented by this petition arise out of a district court order granting judgment for respondents on various state law claims, notwithstanding petitioners' contention that the claims were untimely as a matter of law under the California statute of limitations. The Ninth Circuit affirmed, holding, among other things, that petitioners were barred from obtaining judgment as a matter of law because they had not filed a post-trial motion for judgment under Rule 50(b). This petition thus raises questions similar to those presented in *Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, No. 04-597, *cert. granted*, February 28, 2005, as well as other important issues regarding the proper construction of Rule 50(b).

A. The facts of the underlying action can be briefly summarized. Respondents are horse racing jockeys who were business management clients of petitioner Vincent Andrews Management Corporation ("Andrews Management") and its predecessor from 1967 (in the case of respondent Pincay) and 1979 (in the case of respondent McCarron). *See Pincay v. Andrews*, 238 F.3d 1106, 1107 (9th Cir. 2001) (*Pincay I*), reprinted at Pet. App. 18a-25a. Andrews Management han-

dled its clients' accounting and tax matters, prepared budgets, obtained insurance policies and mortgages, and developed retirement plans. Pursuant to an oral agreement, whose terms dated to 1967, Andrews Management charged its clients five percent of their professional income for those services.

The gist of respondents' grievance is that, without their knowledge, they were allegedly overcharged by petitioners. In essence, their claims rest upon two assertions, both of which they had to establish in order to prevail. First, they allege that their five percent oral contract with Andrews Management precluded petitioners Vincent and Robert Andrews (or any entity in which they had an interest, including petitioner Andrews Management) from having an interest in, or receiving any compensation from, partnerships in which respondents chose to invest. Second, they charge that petitioners received, and concealed their receipt of, such challenged compensation. *See* Pet. App. 19a-20a. Respondents brought suit under both state law and the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq.*

The case ultimately proceeded to trial. After respondents had presented their case, petitioners submitted a motion for judgment as a matter of law under Rule 50(a), Fed. R. Civ. P. In particular, as relevant here, petitioners asserted that all of respondents' claims, whether arising under federal or state law, were barred by the applicable statute of limitations. The motion was not fully briefed or heard until the close of the evidence at the liability phase of the bifurcated trial. The motion was then denied, and the case was submitted to the jury.

The jury found for respondents on both the RICO and the state law claims. *See* Pet. App. 20a. After directing respondents to elect between their RICO remedies and punitive damage awards under state law, the district court entered

judgments on the RICO claims only.[1] Petitioners filed a timely motion for judgment as a matter of law on the RICO claims, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, asserting (as they had in their earlier motion) that the claims were barred by the statute of limitations. The district court denied the motion.

The Ninth Circuit reversed. *See* Pet. App. 18-25a. Pointing out that respondents had received clear written disclosures of petitioners' interests in the partnerships at least as early as 1980, the court held that their RICO claims were untimely as a matter of law. *See* Pet. App. 21a-24a. In so ruling, the court of appeals stated: "It is hard to imagine what would constitute 'enough information to warrant an investigation' if receiving written disclosure of one's purported injury does not." Pet. App. 24a. The court also held that respondents' claims were not tolled by the doctrine of fraudulent concealment, saying that the doctrine only operates before a plaintiff obtains actual notice of the facts underlying the particular claim. *See* Pet. App. 25a.

B. Back in the district court, respondents moved for the entry of new judgments based on their state law claims, which had relied on identical facts and the same theories of concealment and tolling as their RICO claims. Petitioners filed a memorandum in opposition that repeated their contention, previously made in their initial Rule 50(a) motion for judgment as a matter of law, that respondents' state law claims were barred by the California statute of limitations. *See* Memorandum of Points and Authorities In Opposition to Plaintiffs' Motion for Entry of Judgment and Defendants Cross-Motion for Stay, or In The Alternative, Remittitur

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[1] While post-trial motions were still pending, petitioners had filed for bankruptcy, staying further decision. Respondents filed proofs of claim in the bankruptcy court based on their judgments. Subsequently, the bankruptcy court lifted the automatic stay in order to permit resolution of the post-trial motions and appeals regarding the validity of respondents' claims.

(N.D. Cal. Nos. 89-1445 and 89-4965) (Nov. 4, 2001), reprinted at Pet. App. 26a-42a. Petitioners also argued that the intervening court of appeals' decision was "fatal to *all* of Plaintiffs' state law claims." Pet. App. 34a. Emphasizing that the statute of limitations standards under RICO and California law were identical, Pet. App. 34a, the memorandum reiterated that, in light of *Pincay I*, "Plaintiffs' other claims [are] untimely under the applicable statute of limitations . . . ." Pet. App. 37a. Petitioners did not, however, expressly move for judgment in their favor. The district court entered judgments for respondents. *See* Pet. App. 15a.

The Ninth Circuit affirmed.[2] *See* Pet. App. 1a-7a. With respect to the statute of limitations question, the court of appeals held that petitioners were bound by the law set forth in the jury instructions (to which petitioners had not objected), and could not assert "that the California rule is other than that embodied in the instructions and explicitly stated by the district court on remand from us." Pet. App, 4a. Judge Kleinfeld dissented, stating that "[t]here is no reason even to reach or consider the instructions." Pet. App. 6a. Judge Kleinfeld went on: "The appellants' brief makes it crystal clear that they claim that they are entitled as a matter of law . . . to have the limitations bar applied to the state law claims because the reasons for its applicability are indistinguishable from the reasons why we found it applied to the RICO claims in our earlier decision," Pet. App. 6a, adding pointedly that "it is crystal clear that they are right." Pet. App. 6a.

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[2] The district court granted an extension of time for petitioners to file the notice of appeal, finding that the failure to do so within 30 days after judgment was the result of "excusable neglect." *See* Fed. R. App. P. 4(a)(5). A panel of the Ninth Circuit reversed that decision, but the court of appeals, sitting *en banc*, held that the notice was timely. *See Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004). This Court denied respondents' petition for certiorari from that ruling on April 4, 2005 (No. 04-875).